Supreme Court, U.S.
FILED
JAN 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1066

In The

Supreme Court of the United States

October Term, 1987

SIERRA MARKETING CO., a partnership of RALPH BAWDEN and MOISE GALLEGOS,

Petitioners,

v.

ROTATIONAL MOLDING, INC., a California corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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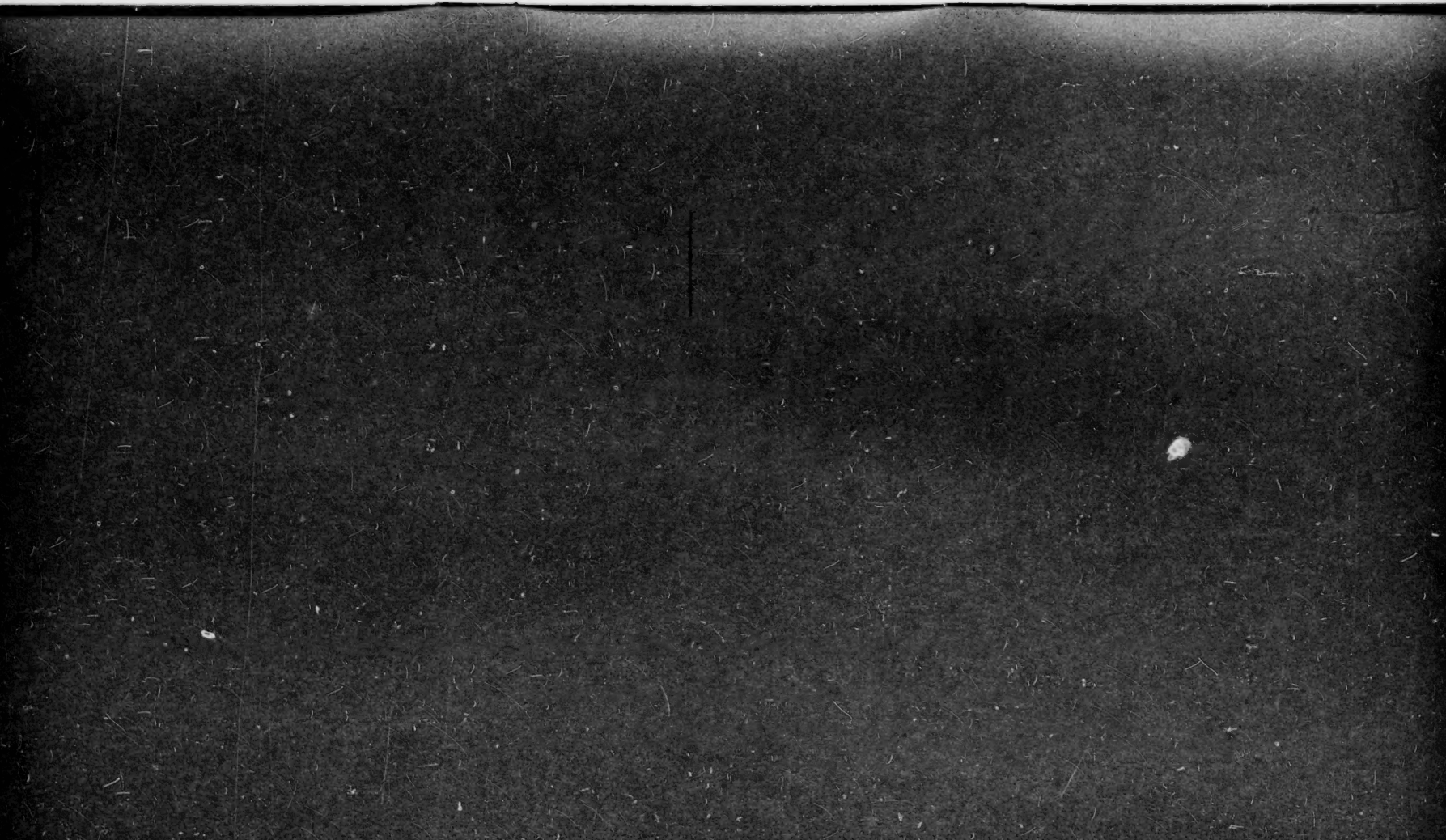

QUESTIONS PRESENTED

1. Whether the price of the product to be sold is an essential term of a sales agency contract?

2. Whether the quantity or amount to be sold is an essential term of a sales agency contract?

3. Whether the ruling of the Court of Appeals, which applied Real Estate contract law to the sales agency contract in this case, directly conflicts with decisions by the Second, Sixth and Eighth Circuit Courts of Appeals and with federal District Court decisions in the Third and Ninth Circuits?

4. Whether there is an overriding need for national uniformity on the law of sales agency contracts?

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ROTATIONAL MOLDING, INC., a California corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioners Sierra Marketing Co. ("Sierra"), comprised of partners Ralph Bawden ("Bawden") and Moise Gallegos ("Gallegos"), filed their Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit (the "Petition") on December 23, 1987 in hopes of convincing this Court that the decisions rendered by the United States District Court For the District of Montana, Billings Division (the "District Court"), and the United States Court of Appeals For The Ninth Circuit (the "Court of Appeals") were both incorrect and should be reversed. In the District Court

and the Court of Appeals, the Petitioners argued successfully that the present case should be governed by California substantive law but now in this Court for the first time Petitioners argue that the issues in the present case concern rules which are "matters of federal common law" (Petition p.2). Petitioners cite four (4) federal cases to this Court which were not cited to or relied upon by the District Court or the Court of Appeals but they should have no applicability to the correct decision in the present case. The present case was properly decided by the District Court and the Court of Appeals based upon very fundamental principles taken from the applicable substantive law of the State of California which is consistent with basic sales agency contract law in most other states so the Petition should be denied. There is absolutely no compelling or even persuasive reason for this Court to grant the Petition.

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are reproduced as APPENDIX C and APPENDIX A at pages 7a and 1a of Petitioners Appendix ("Pet.App.").

JURISDICTION

Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. Section 1254(1) which allows

this Court to review cases in the Courts of Appeals by Writ of Certiorari granted upon the petition of any party to any civil case before or after rendition of judgment or decree. Respondent does not contest the jurisdiction of this Court.

STATUTES, TREATIES AND OTHER LAWS INVOLVED

Petitioners state on page 2 that "The issues in the present case concern the rules of construction applicable to sales agency contracts, which, as discussed infra, are matters of federal common law." This contention by Petitioners is being advanced for the first time in this Court and is totally without merit. The present case is clearly governed by the Rules of Decision Act, 28 U.S.C. Section 1652, which is quoted and discussed below.

STATEMENT OF THE CASE

A. The Contract Between The Parties.

A copy of the Basic Sales Agency Agreement dated May 25, 1983 (the "Agreement") between Respondent and Petitioners is attached as APPENDIX D at page 9a of Pet. App. The Agreement was drafted by Petitioner Bawden and properly construed against Petitioners by the District Court and the Court of Appeals. The Agreement incorrectly states in the first preamble that

Respondent is engaged in the business of manufacturing and selling Septic Tanks when in fact Respondent has never manufactured or sold a useable Septic Tank. Paragraph (6) of the Agreement requires Respondent to furnish to Petitioners a reasonable supply of samples and advertising matter but nowhere in the Agreement is there any requirement that Respondent has to manufacture any Septic Tanks.

Paragraph (3a) of the Agreement refers to a QUOTA SCHEDULE to be attached as Exhibit "A" to the Agreement but the QUOTA SCHEDULE was not attached when the Agreement was signed and the only QUOTA SCHEDULE that was ever prepared or considered was submitted by Respondent to Petitioners as an attachment to a proposed Addendum To Basic Sales Agency Agreement prepared by Respondent on March 23, 1984 containing several proposed amendments to the Agreement which were rejected by Petitioners. Petitioners would lead this Court to believe that a party in negotiations has the right to accept a portion of a counteroffer while rejecting the balance of the counteroffer and thereby create a binding contract.

On June 9, 1983, Respondent set an initial wholesale price of $350 for the proposed Septic Tanks but after reviewing its anticipated development and manufacturing costs, Respondent informed Petitioners that this price would have to be increased substantially. Petitioners resisted Respondent's attempts to increase the price of the proposed Septic Tanks and the parties never reached a final agreement on the price.

The Agreement is silent on the responsibility for design of the proposed Septic Tank but the parties

verbally agreed on May 25, 1983 when the Agreement was signed and thereafter that Petitioners and their "design agent" Charles "Bud" Sweet ("Sweet") would have substantial input into the design of the proposed Septic Tank. To this end, on June 2, 1983, Petitioner Gallegos, a design engineer for Petitioners named Mark Thomas, a representative of Respondent and Sweet met at Sweet's office in Placerville, California to attempt to reach agreement on the proposed design for the proposed Septic Tank and Petitioners believed then that a verbal agreement had been reached. Respondent then proceeded to spend appoximately ten (10) months in designing and building a prototype of the proposed Septic Tank. When Sweet saw the prototype of the proposed Septic Tank at a trade show in April 1984 in San Diego, California, Sweet rejected the proposed Septic Tank as being totally unacceptable and as not conforming to the verbal specifications given by Sweet and Petitioners at the June 2, 1983 meeting. Sweet testified that there is no way that Sweet could ever buy one of the proposed Septic Tanks under any circumstances. Sweet threw away the literature received at the trade show and Petitioners made no further efforts with respect to Respondent's proposed Septic Tank. After the prototype of Respondent's proposed Septic Tank failed twice, Respondent discontinued all further efforts to develop or manufacture a Septic Tank.

B. The District Court's Ruling

The District Court gave as reasons for granting Respondent's directed verdict the matters stated by Petitioners on page 5 of the Petition plus the fact that the first recitation in the Agreement stated that

Respondent was engaged in the business of manufacturing and selling Septic Tanks which was not then true and which fact was well known to Petitioners at that time. The District Court opinion also recites the fact that Petitioner Bawden was the drafter or the author of the Agreement and the Agreement doesn't go far enough to place any responsibility on either of the parties. The District Court opinion thus gives at least five (5) separate reasons for granting the Respondent's Motion for a directed verdict. Although the District Court did not cite any cases at the time of its verbal ruling, Respondent had cited the applicable California law to the District Court prior to the District Court's ruling.

C. The Ninth Circuit's Decision That The Contract Is Invalid.

The Court of Appeals in its Memorandum decision filed on August 5, 1987 (Pet. App. p. 1a) recites the residences of the parties and the fact that jurisdiction in the District Court was based solely upon diversity of citizenship, summarizes the negotiations between the parties and the essential terms of the Agreement, recites the parties' agreement in the District Court that California substantive law applies, states that the Court of Appeals will apply California law for purposes of this appeal and then states that the Court of Appeals would review the District Court's directed verdict de novo as required by existing federal case law. The Court of Appeals then ruled that because essential terms were left open for future agreement by the parties that the Agreement is incomplete and unenforceable citing *Ablett v. Clauson* (1954) 43 Cal.2d 280, 272 P.2d 753 and *Louis Lesser Enterprises Ltd. v. Roeder* (1962) 209

C.A.2d 401, 25 Cal.Rptr. 917. The Court of Appeals concludes its discussion by summarizing all of the areas where the Agreement was and is incomplete and then affirms the District Court's directed verdict.

The Petitioners attack the Court of Appeals decision on several grounds including first that *Ablett v. Clauson, supra,* and *Louis Lesser Enterprises Ltd. v. Roeder, supra,* are both based upon real estate contract law, that the Court of Appeals anomalously concluded that it was necessary for both parties to agree on the design of the proposed Septic Tanks, that the Court of Appeals erroneously dismissed Petitioners' ratification argument as to the QUOTA SCHEDULE and that the Court of Appeals "ignored the large body of national sales agency contract law that has developed over the past fifty years."

Ablett v. Clauson, supra, is a 1954 California Supreme Court decision which affirmed well established principles of law regarding agreements to agree in the future and was based upon principles clearly recognized in *1 Williston,* Contracts (Rev.Ed. 1936) and elsewhere. The general rule quoted in the Court of Appeals Memorandum decision (Pet. App. pages 3a-4a) has been cited and relied upon in numerous California Appellate Court opinions both before and after *Ablett v. Clauson* was decided. The hornbook principle relied upon applies to all types of contract cases in California and not just real estate contract law as Petitioners would lead this Court to believe. In *Roberts v. Adams* (1958) 164 C.A.2d 312, 330 P.2d 900, which relied upon *Ablett v. Clauson, supra,* the California Court of Appeals cites and discusses seven separate California

Appellate Court decisions which reach the same result as *Ablett v. Clauson* on the same legal principle.

Vangel v. Vangel (1953) 116 C.A.2d 615, 631, 254 P.2d 919, is one of the cases cited in *Roberts v. Adams, supra,* which was decided on the same legal principle but did not involve real estate contract law. *Vangel v. Vangel* involved a written partnership agreement which failed to clearly fix the compensation of each of the partners so the California Court of Appeals held that the agreement was incomplete and unenforceable. *Ablett v. Clauson* was also cited with approval in *Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 405, 55 Cal. Rptr. 1, 420 P.2d 713, which is another case decided by the California Supreme Court and which involved a written construction contract.

The Agreement is silent as to the responsibility for the design and manufacturing of the proposed Septic Tanks. Contrary to the Petition, the Petitioners' evidence at the Trial in the District Court showed that the parties verbally agreed that the proposed Septic Tank would be designed to meet the criteria specified by Sweet but the prototype Septic Tank built by Respondent was totally unacceptable to Sweet and the Petitioners because as Sweet testified it was shaped like a garbage can with a blister on it, it had smooth walls and very little ribbing, it was six feet or better in height and was not the long cigar-shape requested by the Petitioners and Sweet so there is no way that Sweet or presumably Petitioners could purchase any of the Septic Tanks.

It is also a basic principle of California substantive contract law and virtually every other state in the

United States that if the parties are still negotiating essential terms of an agreement and one of the parties makes a counter-offer, the other party cannot accept a portion of that counter-offer and reject the balance of the counter-offer and thereby create a binding and enforceable agreement. Petitioners argue that the Court of Appeals should have upheld Petitioners right to accept the proposed QUOTA SCHEDULE which was physically attached to a proposed Addendum to Basic Sales Agency Agreement and create a binding Agreement on their desired terms without accepting the balance of the changes contained in the Addendum.

SUMMARY OF ARGUMENT

Jurisdiction in the present case is based solely on diversity of citizenship. Under the Rules of Decision Act, 28 U.S.C. Section 1652, the substantive law of California governs the rights and duties of the parties. In finding the Agreement incomplete and unenforceable, the Court of Appeals correctly applied California substantive law so the Petition should be denied and Respondent should be awarded its costs.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. This Case Is No Different Than Any Other Diversity Case Where One Party Is Unhappy With The Correct Application Of Substantive State Law By The Court of Appeals.

The Memorandum decision of the Court of Appeals plus virtually every case cited by the Petitioners in the lower Courts applied "ordinary contract law" as determined by the forum state to the agreements in question. The Court of Appeals Memorandum decision can be readily distinguished from all of the cases cited by the Petitioners because there were and are significant factual differences between Petitioners cited cases and the present case as to the certainty and completeness of the agreements in question. Properly understood, there is no conflict between the Court of Appeals decision and the cases cited by Petitioners. The Court of Appeals Memorandum decision correctly applied California law to the Agreement.

A. The Court of Appeals Decision Correctly Applied Established California Substantive Law and Does Not Represent a Departure From Precedents Established or Approved By This Court.

Petitioners first argue that for more than fifty years sales agency contracts have occupied a "special place in the law of contracts" and that the federal courts and state courts following their lead have not required the same standards of definiteness and certainty that applied to other contracts, especially with respect to price and quantity. Although properly understood, the non-California cases cited by Petitioners

should have no relevance whatsoever to the present case, they are in fact consistent with the decisions of the District Court and the Court of Appeals on the questions of price and quantity because they implied prices and/or quantities only where the agreements in question were silent on one or both of those terms. The Agreement in the present case expressly stated that the prices were to be as set forth in the annexed schedule or as fixed by the Respondent and that the quantity was to be governed by the QUOTA SCHEDULE to be attached to the Agreement but no price schedule or QUOTA SCHEDULE were ever in fact attached to the Agreement. Courts should not and have not implied terms when such terms are expressly covered or intended to be covered by the Agreement between the parties. Although each of the authorities and cases cited by Petitioners on pages 9 to 13 of the Petition are clearly distinguishable from the present case, Respondent believes that to make these distinctions any further would be to enhance the Petitioners fallacious argument that there in fact exists a "federal common law on sales agency contracts" which is simply not true.

Petitioners entire argument overlooks and totally fails to address the long standing principles established by this Court in *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 58 S.Ct. 817, 82 L ed 1188 and those contained in the Rules of Decision Act, 28 U.S.C. Section 1652, which provides as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The two principal spheres of federal judicial power established by Article III of the Constitution include cases involving federal matters and suits between citizens of different states. Undoubtedly the greatest confusion and conflict over the choice of substantive law in the federal courts has arisen in those cases where jurisdiction is based on diversity of citizenship. Under the doctrine of *Swift v. Tyson* (1842) 16 Pet. 1, 10 L ed 865, the federal courts were not bound to follow the law of the forum state as declared by the decisions of its courts in matters of commercial law and general jurisprudence even though Section 34 of the original Judiciary Act of 1789, commonly known as the Rules of Decision Act, was virtually identical to Section 1652 which is quoted above. Two of the three Courts of Appeals cases and *U.S. v. Swift* (1926) 270 U.S. 124, 46 S. Ct. 408, 70 L ed 497 cited by Petitioners for the first time in the Petition were decided before *Swift v. Tyson* was overruled by this Court in *Erie R. Co. v. Tompkins*, *supra*.

In 1938, this Court in *Erie R. Co. v. Tompkins*, *supra*, a case famous overnight, disapproved of *Swift v. Tyson* and all its progeny insofar as they established the doctrine that the federal courts, relative to non-federal matters, need not apply a state's non-statutory law and this Court thereby established the general principle that federal courts in diversity cases may not, as to non-federal matters, disregard the applicable state law in matters of substantive rights.

In applying the doctrine of *Erie R. Co. v. Tompkins* that federal courts must follow the substantive law of the states as to non-federal matters, conflict of law

questions arise in cases having multi-state contacts such as the present case. Montana is the forum state in the present case and California was the place of intended performance by the Respondent so the Petitioners and Respondent agreed in the District Court and in the Court of Appeals that the substantive law of the State of California should be applied and this agreement was upheld by the District Court and the Court of Appeals. It would be a travesty of the worst kind to now allow Petitioners to disengage themselves from the controlling California law and allow the law of some jurisdiction unconnected to the present case to be applied so as to support Petitioners' position.

On page 13 of the Petition, Petitioners boldly state their beliefs that "this is a case of first impression for this Court" and that "this Court has never before ruled upon a pure sales agency contract where that contract's certainty and definiteness have been challenged." The legal treatises abound with descriptions of attempts by unsuccessful petitioners to get this Court to grant certiorari in hopes that this Court will establish "federal common law" which will somehow help the petitioners win their cases. This Court has consistently stated that federal courts could formulate federal common law only in certain limited areas where uniquely federal interests were involved or where a federal statute gave courts the power to develop substantive law. In rejecting a right of contribution among co-defendants in a civil antitrust suit, this Court recently spoke unanimously in *Texas Industries, Inc. v. Radcliff Materials, Inc.* (1981) 451 U.S. 630, 101 S. Ct. 2061, 68 L ed 2d 500 as follows:

"There is, of course, 'no federal general common law.' *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law.' See *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947). These instances are 'few and restricted,' *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), and fall into essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964), and those in which Congress has given the courts the power to develop substantive law, *Wheeldin v. Wheeler, supra*, at 652."

B. There Is No Need For National Uniformity In The Interpretation of Sales Agency Contracts.

The grant or denial of a writ of certiorari in this case is governed by Supreme Court Rule 17 which provides in pertinent part as follows:

"1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals *on the same matter*; . . . (emphasis added)."

The Court of Appeals decision in the present case is not in conflict with any decisions of other Courts of Appeals on the same matter because all of the Courts of Appeals cases cited by Petitioners are based upon substantive laws from states other than California.

The Petition properly analyzed and understood is nothing more or less than one final attempt by Petitioners to have this Court supply essential terms and conditions to the Agreement which terms and conditions were negotiated extensively by the parties but upon which no agreement was ever reached by the parties. In order for a Court to enforce an agreement, the agreement must have sufficient standards of performance so that all parties will clearly understand their obligations under the agreement. In the present case, the Agreement placed no obligation on the Respondent to manufacture any specific number of Septic Tanks at any time, the Petitioners had no QUOTA SCHEDULE which they had to meet in order to keep the Agreement in effect, the parties appeared to initially agree on the design of the proposed Septic Tank but the only prototype Septic Tank developed by the Respondent was totally different from what Petitioners expected and it was totally unacceptable to Petitioners and Sweet. If Petitioners were allowed to enforce the Agreement, Respondent could have been required to manufacture Septic Tanks which Petitioners and Sweet said were totally unacceptable and could not be marketed by them.

CONCLUSION

It is indeed a travesty of justice that the present case has had to go as far as it has but it is time for this Court to finally put an end to this case. For all of the foregoing reasons, Respondent respectfully submits that the Petition should be denied and Respondent should be awarded its costs.

Dated: January 26, 1988

Respectfully submitted,

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RULE 28.1 LIST

APPENDIX A

Respondent Rotational Molding, Inc. is a wholly owned subsidiary of Pentron Corporation, a Delaware corporation, which is publicly held. Other affiliates and/or subsidiaries of Respondent and the state or country of incorporation are as follows:

Pentron Products, Inc.	(Calif.)
P.T.I. Industries, Inc.	(Calif.)
Sperex - VHT	(Calif.)
Koala Technologies, Inc.	(Calif.)
Ice Creations Unlimited	(Colo.)
Pacific United Company	(Taiwan)